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Twenty-seventh session

SUMMARY RECORD OF THE 526th MEETING

Held at Headquarters, New York,
on Friday, 3 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 10.10 a.m.

ELECTION OF OFFICERS (continued)

1. Mr. Tuvayanond (Thailand) was elected Rapporteur by acclamation.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Article 41 bis

2. Mr. LEVY (Canada) read out the following revised version of article 41 bis, paragraphs (3) and (4), of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services:

> "(3) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraph (2) of this article when it determines:
>
> (a) that the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or
>
> (b) that the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or
>
> (c) that the nature of the services to be procured is highly complex, specialized, intellectual, technical or confidential, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.
>
> (4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice, or directly to the suppliers or contractors participating in the procurement pursuant to the provisions of paragraph (3). The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any."

3. The text had been prepared by an informal drafting group on the basis of the Commission's discussions of the previous day. The drafting group further proposed that article 11 should be amended to provide that a procuring entity should record any determination made pursuant to paragraph (3) of article 41 bis in the record of procurement proceedings.

4. Mr. TUVAYANOND (Thailand) said that the revised text represented a considerable improvement over the text contained in the annex to document A/CN.9/392 and went a long way towards accommodating his delegation's concerns over the question of direct solicitation. His delegation would, in principle, accept the new draft, provided that it were made available in writing for more careful scrutiny and that the ability of procurement entities to engage in direct solicitation was clearly stated in the official record of the meeting.

5. Mr. KLEIN (Observer, Inter-American Development Bank) said that, while the revised versions of paragraphs 3(a) and 3(b) were an improvement over the previous version, paragraph 3(c) provided far too many exceptions to the rule set forth in paragraph 2. The only grounds on which an exception would be justified would be where the service being sought was of a confidential nature. Otherwise, the Model Law would be eliminating the need for international publication of notices on a wide range of services.

6. The CHAIRMAN said that it might be possible for the drafting group to cut down on the number of adjectives used in paragraph 3(c)O to describe the nature of the services to be procured.

7. Mr. JAMES (United Kingdom) said that he agreed with the Observer from the Inter-American Development Bank that the only appropriate adjective in revised paragraph 3(c) was "confidential". The inclusion of the provisions for the other exceptions in that subparagraph would enable procurement entities to circumvent the need for the international publication of notices in precisely those cases where notice was most necessary. Moreover, such broad exceptions were contrary to the spirit of the Commission's work over the previous five years, the aim of which was to ensure the widest possible publication. He was also concerned about the appropriateness of referring to the Drafting Group matters which involved substantive and not merely drafting or editorial points.

8. Mr. CHATURVEDI (India) requested that further consideration of the proposed text be deferred in order to give his delegation time to study it. The significance of the adjective "intellectual" was not clear to him and he would be interested to learn why the reference to "confidential" services had been included.

9. Turning to article 41 bis, paragraph (1), he noted that notices were usually published in newspapers and not in official gazettes or other official publications, adding that the entire second sentence needed to be clarified.

10. Mr. GRIFFITH (Observer for Australia) agreed with the Observer for the Inter-American Development Bank that revised paragraph 3(c) created too many exceptions to the primary rule established in paragraph (2); it was also counter to the principle of transparency. He considered, finally, that the revised draft raised substantive issues which could not be resolved by the drafting group.

11. Mr. TUVAYANOND (Thailand) said that many of his delegation's concerns had not been met, adding that decisions regarding procurement of services were subject to political considerations, and that such considerations were extremely important. For raisons d'État, his Government did not wish to place contracts with hostile countries. Since no provision had been made for any escape clause

(Mr. Tuvayanond, Thailand)

it was vital that the Model Law should provide for the possibility of direct solicitation, particularly where there was need for confidentiality and confidence in the competence of the supplier. His delegation would have great difficulties unless that concern was accommodated.

12. Mr. WESTPHAL (Germany) said that it had emerged from recent discussions that the issues facing the Commission were highly political. The members of the Commission did not all agree that competition should be the rule in procurement. Such considerations did not relate only to the procurement of services, and the Commission might well have usefully considered them when adopting the Model Law on Procurement of Goods and Construction.

13. In reality, reasons could always be found for single-source procurement where a State thought it important; in fact the draft Model Law allowed for single-source procurement under article 20. In the recent agreement on procurement in the area of services, which had been adopted in the context of the Uruguay Round, the same approach had been taken as in the case of goods and construction. In view of those developments any delay by the Commission in adopting the draft Model Law would lessen the value of its work. Indeed some Eastern European countries were already devising their own regulations.

14. Mr. CHOUKRI SBAI (Morocco) recalled that his delegation had earlier requested the deletion of paragraph 3 (c); the reference to ensuring effective competition should certainly be deleted, since it opened up the possibility of abuse. It would be better to reword the paragraph along the lines of:

> "Where the nature of the services to be procured requires direct tendering, the tenders should come from a sufficient number of suppliers to allow for a certain balance in the competition."

15. There were some areas where only certain suppliers would be appropriate, for example, the restoration of historical monuments or of mosques. It was important to refer to the nature of the service to be procured.

16. Mr. WALLACE (United States of America) said that the Commission debate related essentially to the nature of the procurement of services rather than to article 41 bis per se. Regarding the Uruguay Round, the level of specificity was very different in the case of the General Agreement on Tariffs and Trade. With respect to raisons d'État, the point had been discussed in the Working Group, when dealing with articles 1 and 2, in connection with exclusions of kinds of procurement. The question of whether whole classes should be excluded was not, however, the same as the question of whether direct solicitation should be allowed under article 41 bis, since there might be a desire not to exclude a category from the Model Law but merely to be exempted from the notice requirement, where, for example, there was a need for confidentiality. The concerns raised by the representative of Thailand could be addressed by excluding certain services from the scope of the draft Model Law under articles 1 and 2, and by refining article 41 bis, paragraph 3 (c).

17. Mr. CHATURVEDI (India) said that he shared the concerns expressed by the representative of Thailand regarding nationality. The issue was not just a matter of policy, since, in his country, it could actually be illegal to trade

(Mr. Chaturvedi, India)

with enemy countries. The proper place for such exclusions was, however, article 14 (1), which dealt with obstacles based on nationality. With respect to the exclusions in paragraphs 3 (a), (b) and (c), there was no reason to distinguish between international and domestic publication since the same rationale would apply. Clearly, with respect to paragraph 3 (c), the question of the nature of the services was extremely important.

18. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the representative of China on the need for flexibility regarding publicity in connection with services. The main question was whether paragraph 3 (c) addressed an issue not covered elsewhere; if it did not, it could be deleted.

19. Mr. HUNJA (International Trade Law Branch) said that there were indications in the Commission that direct solicitation should be allowed in connection with services, but there was a problem regarding the nature of the services. The question went beyond the scope of paragraphs 1 and 2 of article 41 bis. If direct solicitation was allowed, there was no need to publish any notice, since the suppliers would be approached directly. If the Commission agreed that direct solicitation should be allowed for some services under paragraph 3 (c), the description of the services could be left to the drafting group.

The meeting was suspended at 11.40 a.m. and resumed at 12.05 p.m.

20. Mr. TUVAYANOND (Thailand) said that members seemed to be focusing too much on the publication requirement when, in reality, the main issue was that of direct solicitation. For that reason, his delegation firmly supported the retention of paragraph 3(c). In addition to confidentiality, there were other special circumstances that required direct solicitation (considerations of national interest for example) which were not covered by the single source procurement procedures. Therefore, his delegation believed it was essential to consider national interests and to ensure transparency in procurement to avoid any possibility of abuse of power by the authorities concerned.

21. Mr. LEVY (Canada) pointed out there were circumstances when direct solicitation was the only solution, and for that reason, it was necessary to retain paragraph 3(c). He suggested that, in addition to containing a reference to confidentiality or national interests, paragraph 3(c) should say something about the nature of the services not warranting a broad solicitation. Another possibility would be to insert parentheses after the reference to confidentiality and national interests so that States could elaborate further. In addition, he suggested that the introductory phrase of paragraph 3 be redrafter after the word "efficiency" to read "the procuring entity need not apply the provisions of paragraph 1 or 2 of this article and may solicit directly when it determines:".

22. Mr. JAMES (United Kingdom) said that if a reference to national interests was to be included in paragraph 3 (c), it should be made clear that the procuring entity was not obligated to apply the provisions of paragraph 2 when it determined that it was not in the national interests to do so. To simply state that the nature of the services did not warrant a broad solicitation, as suggested by the representative of Canada, would not be acceptable as it would

(Mr. James, United Kingdom)

give a procuring entity carte blanche not to advertise. In fact, advertising was essential with the new method of procurement of services, unless there was advertising that method could not be considered a public one. If the Commission was to put forward four enacting States a Model Law that contained a preferred method for the procurement of services, that method should be as public and open as possible.

23. Mr. WALLACE (United States of America) said that he agreed with most of the suggestions made by the representative of Canada. Concerning paragraph 3 (c), he concurred with the United Kingdom representative that as a preferred method it must be as public as possible and that the phrase suggested by the representative of Canada merely restated the problem. The Canadian representative's amendment could be reformulated to read: "that the services to be procured involve (confidentiality, national interest, high professional services, or whatever categories the legislature wishes to specify) provided that it solicits proposals from a sufficient number of suppliers ...". As it was very clear that solutions would differ from country to country, the best possible compromise would be to put illustrations in parentheses or to indicate that the legislature would prescribe the guidelines.

24. Mr. CHATURVEDI (India) supported the proposal made by the Canadian delegation. If he had understood him correctly, the chapeau to paragraph (3) would contain a reference to paragraphs (1) and (2) and paragraph (3) would say something about the nature of services not warranting a broad solicitation. In that connection, the United Kingdom delegation's proposal to shift the burden of proof would not be acceptable. The text proposed by the United States delegation was a very sound idea.

25. Mr. TUVAYANOND (Thailand) said that the proposals made by the representatives of Canada and the United States of America fully accommodated his delegation's concerns. As far as shifting the burden of proof was concerned, the Government was answerable to parliament for its mistakes as it ultimately decided what was good for the country.

26. Mr. SHI Zhaoyu (China) said that paragraph 3 (c) should be retained. Rather than getting bogged down in endless discussions about the adjectives to be used to qualify the nature of services, the Commission could just use the original wording "because of the nature of the services" which, in his delegation's opinion, might make it easier to reach agreement. Like the representative of Thailand, his delegation was concerned not only about the nature of services but also about retaining the message of direct solicitation in the paragraph.

27. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the amendment proposed by the United Kingdom delegation as the inclusion of the notion of confidentiality and national interests made the paragraph more restrictive; merely referring to the nature of services would leave the door open for exceptions which would then lead to all the abuses which the principles of the Model Law were meant to control.

28. Mr. AL-NASSER (Saudi Arabia), referring to paragraph 3 (c), said that the insertion of the phrase "if conditions exist which would require procurement

(Mr. Al-Nasser, Saudi Arabia)

through direct solicitation" before the particular rule concerning the nature of the services to be procured should cover the notion of confidentiality and national interests as well.

29. Mr. HERMANN (Secretary of the Commission) said that delegations should focus more on the particular circumstances than on the nature of services. He did not quite understand why there seemed to be a controversy over the burden of proof. Paragraph (3) offered an exception to the requirements of paragraphs (1) and (2) and it was therefore much more appropriate to indicate what was meant by burden of proof. Given that a number of delegations had stressed the need to ensure that procurement should be as public as possible, it was perhaps not a good idea to encourage Governments to add all kinds of reasons for not using the procedure set out in paragraphs (1) and (2).

30. Mr. SHI Zhaoyu (China) said that the Working Group had agreed in previous discussions that it was up to the various States that adopted the Model Law to decide on its scope of application and on the nature of services to be included because it was impossible to draw up an exhaustive list of all the services to which the Model Law was or was not applicable. That principle also applied to paragraph 3 (c). Such an approach would make it easier to reach agreement.

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 527th MEETING

Held at Headquarters, New York,
on Friday, 3 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

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NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

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The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

Article 41 bis (continued)

1. The CHAIRMAN said it seemed that the problem posed by paragraph 3 (c) might be resolved in accordance with the suggestions of the United States of America and Canada by incorporating in the text the idea that direct solicitation of proposals could be employed where confidentiality or the national interest so warranted. The drafting group would prepare a text that reflected that idea.

2. Ms. SABO (Canada) said that the drafting group would have to be given clear instructions about paragraph 3 (c). She also wondered whether the chapeau of paragraph 3 would still include a reference to paragraph 1 and whether there was a consensus in that regard. She also wondered whether the chapeau of paragraph 3 would include a reference to direct solicitation.

3. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer article 41 bis to the drafting group.

4. It was so decided.

Article 41 ter

5. The CHAIRMAN stressed the importance of the chapeau of the article, which specified that the request for proposals should include, at a minimum, certain information. That meant that the procuring entity could add other requirements and States could do the same when they incorporated that provision in their national legislation.

6. Mr. WALLACE (United States of America) said that he approved of the text of subparagraphs (j) and (k) of article 41 ter, which were similar in content to article 25, except that they referred to services. Article 41 sexies contained references to the so-called two-envelope method, in which one envelope contained technical and quality data and the other contained price data. The two envelopes could be examined at the same time or one after the other, depending on the method used. In that regard, the request for proposals for services should indicate the procedure for evaluating proposals that stated the price and those that did not. Article 41 sexies set out four procedures for evaluating such proposals (in paras. 2 (b) (i), 2 (b) (ii), 3 and 4).

7. The CHAIRMAN said that paragraph 1 of article 41 ter might help solve the problem raised by the representative of the United States of America.

8. Mr. CHATURVEDI (India) said that article 41 ter contained superfluous elements that did not refer specifically to services. A case in point was subparagraph (d), given that the right to reject proposals already appeared in

other articles. Subparagraph (e) should be deleted because the criteria and procedures mentioned did not have to be specified in the case of services. Subparagraphs (j) and (k) should be reworded because both stipulated "if referred to price as a relevant criterion". In subparagraph (k) the phrase "including a statement as to whether the price is to cover elements of even the cost of services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes" should be deleted. Such information should be provided by the supplier, not by the procuring entity. Subparagraph (r) should be deleted because it referred to the terms and conditions of contracts in general, whereas article 41 ter dealt specifically with services. Subparagraph (s) should also be deleted because it was up to the supplier to find out about any pertinent laws. Subparagraph (t) was superfluous because there was no need to notify the supplier that it had the right to appeal for review provided for in article 42.

9. The CHAIRMAN said that, while a supplier might be expected to be familiar with the legislation in force, it might perhaps be unaware of some of the lesser administrative regulations. It would therefore be helpful to let subparagraphs (r) and (s) stand. Moreover, since almost all solicitation notices included a mention of the right of review, it would be appropriate to retain subparagraph (t). With regard to subparagraph (d), the right to reject proposals also appeared in article 11 bis. The wording used in the latter article, however, was "if so specified in the solicitation documents", so that there was a difference between the two provisions. Moreover, the Working Group felt that there was majority agreement on those points, which should be taken as a minimum.

10. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 41 ter was perfectly adequate and contained alternative proposals that could serve as safeguards in the tendering process in the event that some of the methods specified were eliminated. With regard to subparagraphs (j) and (k), it would be very helpful if the Guide to Enactment indicated when price should be considered a relevant criterion and when it should not. Price should not be a relevant criterion when the services entailed a high degree of technical complexity or might have a substantial impact on the final product.

11. Mr. HUNJA (International Trade Law Branch) said that some delegations were concerned that subparagraphs (j) and (k) began with the phrase "if price is a relevant criterion" because it could be interpreted to mean that in most cases it was not. He therefore suggested that the two subparagraphs should be reworded to read: "information shall be provided as to the currency or currencies in which the proposal price is to be expressed and the manner in which the proposal price is to be expressed, unless price is not a relevant criterion".

12. Mr. JAMES (United Kingdom) added that, since the method described in article 41 ter was the most appropriate method for the procurement of services, it was fitting that it should incorporate the principles of openness and transparency characteristic of public tendering, which were reflected in the procuring entity's obligation to provide as much information as possible at the earliest possible stage of the tendering process. He was also convinced that

the procedure that was specified in the Model Law on Procurement of Goods and Construction should also be applied to services.

13. Mr. LEVY (Canada) urged that the wording of article 41 ter should be left as it was.

14. Mr. TUVAYANOND (Thailand) said that while he had no problem with the article, he wished to have clarification of two of its provisions. First, with regard to subparagraph (n), he pointed out that wide fluctuations in exchange rates were the norm, which made that subparagraph unnecessary. Secondly, with regard to subparagraph (t), if one assumed that everyone knew the law, the subparagraph seemed superfluous, particularly since article 42 did provide for the possibility of filing an appeal for review.

15. The CHAIRMAN said that fluctuations in exchange rates were precisely why subparagraph (n) had been included. Proposals should indicate not only the currency in which the price should be expressed, but also the exchange rate that would be used to convert it; failing that, reference should be made to an exchange rate published by a financial institution - a bank, for example - on a specified date. With regard to subparagraph (t), he pointed out that, at least under legal systems based on Roman law, in any public solicitation held pursuant to law, a public authority was required to indicate what recourse was available to the parties involved in the solicitation process or what exemptions they were entitled to under the law.

16. Mr. LEVY (Canada) reminded the Commission that the Working Group's intention was to ensure that suppliers and contractors had alternative ways of setting their prices, whether they involved exchange rates, with reference to World Bank special drawing rights (SDRs) or European Currency Units (ECUs) of the European Community, or a statement that the rate of exchange set by a bank or financial institution on a given date would be applied. The purpose of subparagraph (t), meanwhile, was to ensure transparency by facilitating the procurement process and making it unnecessary for suppliers or contractors to have to find out for themselves what recourse was available to them.

17. Mr. CHATURVEDI (India) agreed that information on the right of review provided by law was highly important, but he was not clear which party should bear the burden of providing or obtaining such information. According to subparagraph (s), the procuring entity was not liable if it omitted the references to the relevant laws or regulations, yet that entity was certainly in the best position to know what regulations were applicable.

18. With respect to subparagraph (j), he wondered if there were any situations in which price was not a relevant criterion. He had serious misgivings about the wording of that paragraph.

19. With regard to subparagraph (k), he believed that it was up to the supplier or contractor and not the procuring entity to state whether items other than the cost of the services were to be included in the price. He also pointed out that, according to the chapeau of article 41 ter, the request for proposals should include "at a minimum" the information listed in that article, which consisted of no less than 22 subparagraphs. The minimum requirements could be

covered by subparagraphs (a), (b), (c) and a few others; otherwise there were too many superfluous paragraphs, which placed an undue burden on one of the parties.

20. With reference to the observation by the representative of Thailand regarding ignorance of the law, he felt that it was up to the supplier or contractor to find out what laws applied.

21. With regard to subparagraph (n), currency conversion was always an option and it was not necessary to mention it explicitly. What should not be done was to require the supplier to set a rate of exchange that would fluctuate widely; he could only accept establishing in principle that an exchange rate set by a particular financial institution should be used.

22. The CHAIRMAN said that there did not appear to be a consensus within the Commission to delete so many subparagraphs; consequently, if he heard no objections, he would take it that the Commission wished to approve article 41 ter in so far as substance was concerned and to refer it to the drafting group for consideration of the proposed changes.

23. It was so decided.

Article 41 quater

24. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the word "only" in paragraph 1 was too restrictive; it was conceivable that some other important criteria might have been left out. He suggested that the chapeau should conclude with the words "and may concern principally the following".

25. He then pointed out that there were three basic criteria for the evaluation of proposals. The first was the qualifications and experience of the particular supplying or contracting firm; the second was the methodology that the company intended to employ in the assignment; and the third and most important, because it was given greater weight, was the professional competence of the personnel the company intended to assign to the project. He therefore suggested that paragraph 1 (a) should be changed to read:

> "(a) The qualifications, experience in the field of assignment, reputation, reliability and professional and managerial competence of the supplier or contractor and of the key personnel which the supplier or contractor proposes to employ in the assignment;".

26. With reference to paragraph 1 (c) and to the comments made previously by the representative of India with respect to the relevance of price as a criterion, he noted that the World Bank had compiled statistics on proposals for which price was not a relevant criterion, either because the projects were too complex or because the quality of the final product was critical, and had found that they constituted 35 to 40 per cent of all such projects. He also noted that in paragraph 1 the word "may" was used, a term that did not imply an obligation. Subparagraph (c) would be improved if it began with the words "the

proposal price, it if is to be a criterion, and the manner in which it is to be taken into account"; the rest would remain the same.

27. Mr. WALLACE (United States of America) agreed with the suggestions made by the previous speaker regarding subparagraphs (a) and (c). The reference to personnel in subparagraph (a) could be made even more explicit if the adjective "relevant" was inserted in front of the word "qualifications".

28. The comments of the observer from the Inter-American Development Bank concerning subparagraph (c) applied also to what the representative of the Secretariat had said concerning subparagraphs (j) and (k) of article 41 ter. It was certainly true that subparagraph (c) had to be worded very carefully, given that price was not a very important criterion for many categories of services that were the object of procurement. In any event, the wording of the subparagraph was acceptable, since it was to be read in conjunction with paragraph 1, which not only used the term "may" but also included the phrase "and the manner in which they are to be applied".

29. He did not agree, however, with the suggestion that the word "only" should be replaced by "principally" in paragraph 1. He recalled that the Working Group had deliberately used that wording to maintain the parallelism with the wording of article 32, paragraph 4 (c), even while recognizing that the latter referred to a different procedure, the intention being to make the practice of procurement as systematic and uniform as possible. On the other hand, subparagraph (e) provided greater flexibility in the use of social policy criteria by using the language "national defence and security considerations".

30. Mr. JAMES (United Kingdom) said that the Working Group had in fact debated at length the question of whether the use of any or all of the evaluation criteria listed in the Model Law should be mandatory or optional (A/CN.9/392, para. 67). The word "may" had been considered necessary to give the procuring entity discretion in choosing the criteria it wished to employ. On the other hand, it had been felt that, in keeping with the spirit and provisions of the Model Law, certain limits had to be placed on the criteria that the procuring entity could take into account in the case of tendering, the preferred method for the procurement of goods and construction, and in the case of a request for proposals, the preferred method for the procurement of services.

31. The purpose of the Model Law was to establish norms that would serve as guidelines for framers of national legislation on the subject. In his view, then, the criteria included in article 41 quater were appropriate, and the procuring entity was free to use them to whatever extent it wished.

32. Mr. CHATURVEDI (India) said that he disagreed with the content of the second sentence of paragraph 1 for three reasons. In the first place, it would be impractical for the procuring entity to act in the manner described there in cases where it only needed to procure the services of one or two persons. In the second place, he did not see why the procuring entity should have to notify the suppliers and contractors of the evaluation criteria in every case. In the third place, according to the end of the sentence, those criteria could "concern only" matters that did not include the criteria of confidentiality and national interest, discussed in connection with the previous article, or technology

transfer and export promotion, two criteria of vital importance to developing countries that ought to have been included in paragraph 1 (d).

33. The CHAIRMAN observed that confidentiality bore no relation to the article in question and that technology transfer and export promotion were implicitly included in paragraph 1 (d). Furthermore, that paragraph authorized the procuring entity to establish its own evaluation criteria, so that if a State ascribed importance to the above-mentioned issues, it was free to state that it would take them into account when reaching a decision. The paragraph could not be interpreted to mean that the criteria could relate to any subject whatsoever, since there would then be no point in including the article in the draft.

34. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the article ignored one important technical aspect of the question. While he was not opposed to a listing of basic evaluation criteria, he felt it was essential that they should be able to be applied with flexibility and adapted to specific situations, given the very nature of services, especially highly specialized services.

35. Mr. WALLACE (United States of America) supported the Chairman's view that the text of article 41 quater accommodated the concern of the representative of India, since it recognized that the procuring entity was free to evaluate proposals according to the criteria that it considered appropriate; that was clear from paragraph 68 of document A/CN.9/392, from the words in brackets at the end of paragraph 1 (d) of article 41 quater, and from paragraph 1 (b) of the same article. India was correct in observing that that provision was not appropriate in cases where a limited number of persons were to be hired. In such cases, the method of solicitation of quotations might be used.

36. However, he did not agree with the remark made by the observer for the Inter-American Development Bank. Subparagraphs (a), (b) and (c) were important, particularly the first two. The procuring entity would explain as specifically as possible the requirements suppliers and contractors were expected to meet and how it would apply the evaluation criteria, which would be adapted when the request for proposals was drawn up. The request could accommodate whatever variations circumstances required. In other words, the subparagraphs were worded so as to give ample room for flexibility while avoiding arbitrariness in the evaluation of proposals.

37. Mr. TUVAYANOND (Thailand) said that while the article provided some flexibility, it was also restrictive. He wished to know whether environmental issues, primarily pollution, were covered. If not, changes would need to be made to include them. The article must also take into account the fact that certain countries applied exchange controls, which sometimes made it impossible to repatriate the entire agreed price at one time, particularly in cases where the services had been rendered in the territory of the procuring State.

38. Mr. LEVY (Canada), supported by Mr. WESTPHAL (Germany), said that environmental questions could be addressed in the description of services provided for in article 41 ter, subparagraph (g), and that proposals from suppliers and contractors could also be evaluated from that perspective under

article 41 quater, paragraph 1 (d). Questions relating to currency exchange were already dealt with, for example, in article 41 ter, subparagraph (s).

39. Mr. CHATURVEDI (India) said that it was currently impossible to undertake a major procurement project without the approval of the environmental protection authorities and that, in view of the importance of the issue, it should be included in article 41 quater, paragraph 1 (d). He also agreed with the United States representative that the transfer of technology and export promotion could be dealt with in that paragraph. Nevertheless, it would have been preferable to make a specific reference to those criteria. He therefore proposed that the word "only" should be deleted from the chapeau of paragraph 1. As for the suggestion by the representative of the United States of America to add the word "relevant" to paragraph 1 (a), he did not feel that that term should be used to qualify the reputation and reliability of the supplier or contractor.

40. The CHAIRMAN said that although environmental issues were becoming increasingly important, there were few cases in which the rendering of specific services was likely to have an impact on the environment. In any case, the procuring entity could include that factor in the evaluation criteria under article 41 quater, paragraph 1 (d), or article 41 ter, where the minimum contents of requests for proposals for services was discussed.

The meeting was suspended at 4.40 p.m. and resumed at 5 p.m.

41. Mr. WALLACE (United States of America), supported by Mr. JAMES (United Kingdom), said that the need to ensure that the draft law reflected concern for environmental protection must be borne in mind. At the same time, the list of criteria in paragraph 1 (d) could not be endless. If the environment was to be mentioned, it would also be necessary to refer to the effects of services on income distribution, health, science and technology and many other factors. There must be a limit to the list of criteria, particularly since effects on the environment were many and varied. There was no doubt that that impact would be far more significant in the case of goods and construction than in that of services. In any event, the draft left ample room in which to deal with that issue, since both article 32, paragraph 4 (c) (iii), and article 41 quater, paragraph 1 (d), specified that "the enacting State may expand subparagraph (d) by including additional criteria". Furthermore, from the standpoint of the structure and wording of the draft law, it would be inappropriate to include anything in article 41 quater, paragraph 1 (d), that did not appear in article 32.

42. Mr. LOBSIGER (Observer for Switzerland) said that environmental considerations should not lead to the adoption of more protectionist practices than did the other criteria mentioned in paragraph 1 (d). In any case, the environmental impact of a service must certainly be mentioned, and the place to do so was in article 41 ter rather than article 41 quater.

43. Mr. TUVAYANOND (Thailand) noted that his country had already applied environmental criteria in a case of procurement involving a proposal for services, and had opted for a more expensive proposal because it entailed less risk of pollution. Paragraph 1 (d) already gave Member States an opportunity to

take that criterion into account, which might be decisive in the evaluation of proposals.

44. Mr. CHOUKRI SBAI (Morocco) noted that the Arabic version of the chapeau of article 41 quater did not contain the word "only". The French version read "ne peuvent concerner que", which was equivalent to a negative construction, whereas the Arabic used a positive construction which seemed to leave room for discretion, in deciding whether or not to inform suppliers and contractors of the criteria.

45. Mr. CHATURVEDI (India) said that it would be inappropriate to take a decision on the use of a positive or a negative construction, since that would imply that one text was more authentic than the other. As for the question of whether or not to include a provision relating to the environment in the text, he noted that the article referred primarily to services, although not exclusively, since it could also be applied to goods and construction. The term "services" was very broad, and there were cases where the question of the environment did not arise. Moreover, legal instruments containing obligatory and detailed provisions on the environment had already been adopted and were entering into force. There was therefore no need to refer to the environment in the Model Law.

46. Mr. GOH (Singapore) suggested that, in order to meet the concerns raised by the representative of Thailand, the words "may concern only" should be replaced by the words "shall include the following", which would give the procuring entity flexibility.

47. The CHAIRMAN reminded the Committee that most delegations had preferred the word "only".

48. Mr. KLEIN (Observer for the Inter-American Development Bank), speaking on behalf of the World Bank and of his own institution, raised the issue of margin of preference. While the hiring of national consultants should be encouraged, the best way of doing so would be to refer to the real advantages of such recruitment, such as the consultants' familiarity with the local setting or language, for example. Such a reference could be added to the Model Law so as to allow or require foreign companies to work with national companies, provided that mandatory quotas or percentages were not set and that there was no requirement to work with specific companies. That was a much more effective solution than assigning national companies a certain weight merely because they belonged to the country procuring the service. What actually happened when services were sold was that knowledge was sold, and if the quality of the services declined everyone lost. Finally, the introduction of a margin of preference, which was uncommon in the case of services, could result in double counting, since a certain number of points was being awarded for familiarity with the milieu or the language on the one hand while preference was being given to nationality on the other. Although the objective was, clearly, to assist national consultants, care must be taken to ensure it was done in the manner that was most beneficial to all the parties concerned.

49. The CHAIRMAN said that the question raised was particularly appropriate for inclusion in the Guide to Enactment, since the latter could indicate the

problems that were coming up in most countries. In the system of joint ventures or temporary partnerships, the challenge was to provide a service by identifying the most suitable national contractor. That method was far better than fixing percentages. It would be useful if the Guide referred to the need to resolve those questions.

50. Mr. CHATURVEDI (India) said that his country was not in favour of placing any limit, even indirectly, on the percentage of the margin of preference for companies and national consultants. On the contrary, that practice should be encouraged.

51. The CHAIRMAN agreed with that position; it was necessary to respect a tradition that was not only observed in a number of countries and legislations but which was also set forth in the General Agreement on Tariffs and Trade (GATT). One way to promote development was to provide for a margin of preference for national contractors. In the light of the comments made, however, the draft text could be referred to the drafting group.

52. It was so decided.

Article 41 quinquies

53. Mr. TUVAYANOND (Thailand) said that he would prefer to delete from paragraph 1 the requirement that the procuring entity should communicate the clarification to all suppliers or contractors, since some of them would probably not need such clarification and the requirement merely placed an additional burden on the procuring entity. Clarifications should be communicated only to those who requested them. The same comment applied to paragraph 3, since not all suppliers or contractors might be interested in the minutes of the meeting containing the requests for clarification and the responses to those requests. In particular, the Model Law did not need to specify how the information should be used and thus should not say "so as to enable".

54. The CHAIRMAN said that all contractors had an equal right to know what response had been given to a request for clarification which might throw light on the contract or on the inclinations of the procuring entity. What was important was for the supplier to have that information in order to prevent any irregularities when the contract was awarded.

55. If he heard no objections, he would take it that the Commission wished to approve article 41 quinquies as currently worded.

56. It was so decided.

Article 41 sexies

57. Mr. WALLACE (United States of America) said that he was in general agreement with the wording of the article but would welcome clarification of a few minor points. With regard to paragraph 3 (a), he wished to know what the criteria were for rejecting proposals and whether those criteria were related to the threshold level referred to in paragraph 2 (a). In paragraph 3 (c), the word "normally" could be inserted before the words "be considered". As for

paragraph 1 (c), the commentary should indicate whether the impartial panel of experts would provide advisory services or whether it could also take decisions.

58. The Guide should indicate when the criteria set out in paragraphs 2 (b) (i), 2 (b) (ii), or 4 should be used. It should also explain how each of those methods should be applied, since the Model Law said nothing on that subject.

59. Mr. WESTPHAL (Germany), referring to paragraph 2 (a), said he agreed with the idea of rating each of the proposals. However, he wished to know what the threshold level was and what criteria were used in determining it.

60. Mr. LOBSIGER (Observer for Switzerland) said that paragraph 1 (c) was missing from the French version.

61. Mr. HUNJA (International Trade Law Branch) said that paragraph 2 did not give the procuring entity any guidelines for determining the threshold level; at the previous session of the Commission, the representative of the United States of America had suggested in relation to another matter that guidelines should be included in the Model Law. However, the Working Group had been somewhat reluctant to do so, and it had expressly decided that it would not be appropriate to include such guidelines in the Model Law, although they might perhaps be included in the Guide.

62. In order to clarify the meaning of paragraph 2, a basic procedure for establishing the threshold could be the following: in the case of the procurement of intellectual services, for example, the procuring entity would decide that, with respect to the technical, or non-price, aspects of the proposal, it would establish a rating system based on a set scale, and it would do the same to rate the competence of project personnel and the time spent in providing such services.

The meeting rose at 6.05 p.m.